No Brief for Def't

313 U.S. 564

FILED
MAR 6 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 818

DAVISON-PAXON COMPANY,

Petitioner,

vs.

LISABETH CALDWELL, BANKRUPT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HOUSTON WHITE,
Counsel for Petitioner.

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DAVISON-PAXON COMPANY,

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vs.

LISABETH CALDWELL, BANKRUPT,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Statement of Matter Involved.

This case involves an interpretation of the principles of *Local Loan Company* v. *Hunt, infra,* a leading decision of this Court on the exercise of jurisdiction by the Federal Bankruptcy Courts, about which there is a conflicting interpretation in the Fifth Circuit Court of Appeals in the instant case and the Second Circuit Court of Appeals; and also an interpretation of an important section of the Federal Bankruptcy Act, about which there is a conflict between the Fifth Circuit Court of Appeals and the appellate courts of four States. This provision of the Bank-

ruptcy Act never has been, but should be authoritatively interpreted by this Court.

Petitioner is an Atlanta department store, hereinafter referred to as the "seller". Respondent is a secretary to a railway official, hereinafter referred to as the "buyer" or "bankrupt". Seller filed suit against buyer in a State Court of Georgia to recover damages from the buyer alleging a deceit in obtaining goods that would otherwise not have been delivered. The State Court action alleged the deceit in terms substantially that when the goods were purchased, the buyer was insolvent and had no present intention to pay for them. After filing of the suit and before trial thereof in the State Court, the buyer filed a voluntary petition in bankruptcy, and thereupon filed a plea for a stay on account of bankruptcy in the State Court. At the trial, the State Court had before it not only the question on the merits of the allegations of the petition, but also the question raised by the plea for a stay on account of bankruptcy. At the time of the trial in the State Court, the buyer had not obtained a discharge in bankruptcy. It was the State Court practice that if the plea for a stay on account of bankruptcy should be sustained, the court would not go into the merits of the case, but would grant a stay until the bankruptcy proceedings be terminated. However, under State Court practice, if the liability sued upon was excepted from a discharge in bankruptcy, the State Court would deny the plea for the stay, and decide the case on its merits. The State Court denied the plea for a stay on account of bankruptcy (alleged in buyer's petition in equity and admitted in answer, R. 13, 36), and on the merits gave a money judgment for the seller for the damages it suffered from said deceit. At the time the State Trial Court rendered said judgment, the Georgia Appellate Courts, by which the State Trial Court was bound, had determined in

a long line of decisions that a liability based upon the purchase on credit of goods, while insolvent, and without a present intention to pay for them, as alleged in the seller's State Court petition, was a false pretense or representation of the purchaser's intention, and therefore was a liability based on a false pretense or false representation expressly excepted from a discharge in bankruptcy by Section 17 (2) of the Bankruptcy Act. The State Court Trial Judge followed these Appellate Court decisions in denying the plea for a stay on account of bankruptcy. The buyer permitted time to expire within which an appeal to the State Appellate Courts could have been made. After time for an appeal in the State Courts from the State Court judgment had expired, but before the bill in equity hereinafter described was filed, buyer obtained a discharge in bankruptcy. Likewise, after said time for said appeal had expired, seller caused garnishment proceedings in another State Court to issue based on said State Court money judgment and directed to the railway Company at which the buyer was employed. The buyer, however, made no effort in said State Court to stay said garnishment proceedings, although under State law and practice, if said State Court judgment was dischargeable in bankruptcy, by appropriate pleadings in the form of either a motion for a stay or an affidavit of illegality, buyer bankrupt could have insisted on a permanent stay on account of bankruptcy in the State Court having jurisdiction of the garnishment proceedings. It was extremely doubtful that the buyer would have obtained any relief in any State Court, because of said long line of State Appellate Courts decisions predetermined against the buyer, and would have obtained final relief from proceedings throughout the State Courts, if said State Courts decisions were erroneous, only upon a determination thereof upon writ of error granted by the Supreme Court

of the United States to correct the decisions of the State Appellate Courts, which writ of error could have been obtained as a matter of right. *Lesser* v. *Gray* (Georgia 1915) 236 U. S. 70, 35 S. Ct. 227, 59 L. Ed. 471. But the buyer, purporting to come within the doctrines laid down in *Local Loan Company* v. *Hunt*, 292 U. S. 234, filed a bill in equity in the United States District Court seeking to enjoin the seller from proceeding to enforce said State Court judgment either by way of garnishment or otherwise on the ground that the State Court liability was dischargeable in bankruptcy; that said State Appellate Court decisions holding such a liability not dischargeable in bankruptcy were erroneous and contrary to the policy of the Bankruptcy Act; and that the judgment of the State Trial Court denying said stay, being based upon such Appellate Court decisions, was also erroneous and contrary to the policy of the Bankruptcy Act. The seller joined issue in the District Court and insisted (1) that the Federal Court should not exercise jurisdiction in the case, because said State Appellate Court decisions were not contrary to the policy of the Bankruptcy Act in the sense demanded by *Local Loan Company* v. *Hunt, supra;* that the Federal Court should not exercise the jurisdiction defined in *Local Loan Company* v. *Hunt* at the instance of the buyer, a deceitful and dishonest bankrupt; and that buyer could not come into the Federal District Court to have the State Court judgment retired, even though it might be erroneous, and (2) that the State Court suit and judgment thereon was a suit and judgment based upon a liability "for obtaining money or property by false pretenses or false representations" within the meaning of Section 17 (2) of the Bankruptcy Act, and therefore said State Court judgment was excepted from buyer's discharge in bankruptcy. There was introduced in evidence before the Federal District Court in addition to the allegations of the Federal Court petition (R. 10 thru 15) which were ad-

mitted in the answer (R. 35, 36), the record of the State Court proceedings consisting of the pleadings and the judgment thereon (R. 16 thru 28), the affidavit of the Attorney for the seller (R.31) and of the State Court Judge (R. 34) concerning the State Court proceedings, but the evidence used in the State Court trial was not introduced by either party in the Federal District Court. The Federal District Court, although it did not have the State Court evidence before it and not feeling itself bound by the State Court pleadings, retired the issue of deceit made by the State Court pleadings, and found that there was in fact no deceit, thereby retrying in the Federal Court the issue made in the State Court by the plea for a stay on account of bankruptcy; that this bankrupt was in fact an honest bankrupt; that the Federal District Court had jurisdiction under *Local Loan Company* v. *Hunt, supra,* because said State Appellate Court decisions were erroneous and contrary to the policy of the Bankruptcy Act; and that the State Court judgment was dischargeable in bankruptcy, and that the State Court petition which charged a liability of a purchaser of goods on credit, who bought same while insolvent and without a present intention to pay for same, did not charge a liability based upon a false pretense or false representation within the meaning of Section 17 (2) of the Bankruptcy Act. The Federal District Court thereupon rendered judgment enjoining the seller from further proceedings to enforce said State Court judgment by way of garnishment proceedings or otherwise. On appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, the Circuit Court affirmed the District Court in a two to one decision, Judge Sibley writing a dissenting opinion. The Circuit Court of Appeals held that the District Court should not have speculated about the evidence introduced in the State Court in support of the allegations of the State Court petition, and should have considered the State Court peti-

tion to have been proved as alleged and that the bankrupt must therefore be considered deceitful and dishonest as found by the State Court; that the District Court should have exercised jurisdiction because of the settled but erroneous line of decisions in the Georgia Appellate Courts although the bankrupt admittedly be deceitful and dishonest, and although bankrupt had made an effort to stay the State Court proceeding by insisting on a stay on account of bankruptcy; but that the allegations of the State Court petition did not set forth a liability based upon a false pretense or false representation under Section 17 (2) of the Bankruptcy Act, because said deceit charged did not contain a positive or overt false pretense or representation. Judge Sibley, in his dissenting opinion, took issue with the interpretation requiring a positive or overt false pretense or representation and held that the deceit charged in the State Court petition, based upon an implied false representation of the buyer's intention to pay for the merchandise, charged a "false pretense" within the meaning of said Section 17 (2) of the Bankruptcy Act and therefore the State Court judgment was not dischargeable in bankruptcy. His dissenting opinion did not mention the jurisdictional questions for the evident reason that his ruling required the District Court to dimisss the petition in equity on its merits.

Federal Questions Presented.

(1) Whether or not State court decisions, even if erroneous, interpreting said Section 17 (2) of the Federal Bankruptcy Act to the effect that such a liability is based upon a false pretense or false representation and therefore not dischargeable in bankruptcy are so contrary to the policy of the Bankruptcy Act in the sense of *Local Loan Company* v. *Hunt, supra,* as to justify the exercise of jurisdiction by a Federal District Court sitting as a bankruptcy court to correct said erroneous State decisions.

(1 a) Whether or not the unusual exercise of jurisdiction of the bankruptcy court as defined in *Local Loan Company* v. *Hunt, supra,* shall, because of a policy of the Bankruptcy Act to reprove commercial dishonesty as well as grant relief to honest bankrupts from their honest debts, be confined to relief sought at the instance of innocent and honest bankrupts, or shall be extended to the relief of a bankrupt, whose liability was adjudicated by a State court to be intentionally deceitful and dishonest, even though said liability may be dischargeable in bankruptcy.

(1 b) Whether the principles of *Local Loan Company* v. *Hunt, supra,* shall be construed to mean that whenever a State court is alleged to have determined erroneously that a creditor's debt is not released by the bankrupt's discharge, the latter may come into the bankruptcy court and have the issued retried, or, whether the bankrupt must pursue his remedies first throughout the State courts, and subsequently by writ of error to the United States Supreme Court from the highest Appellate Court of the State.

(2) Whether or not a liability in deceit of a purchaser of goods on credit, who at the time of purchase and delivery of the goods promised to pay therefor, but who at said time was insolvent and had no intention of ever paying for them, is a liability based upon a false pretense or false representation within the meaning of Section 17 (2) of the Bankruptcy Act as amended June 22, 1938, 52 Stat. 851.

Jurisdictional Statement.

(A) The statutory provision sustaining jurisdiction of the Supreme Court in the instant case is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28, Section 347 U. S. C. A.

(B) The principles of the decision of the United States Supreme Court in the case of *Local Loan Company* v. *Hunt,* 292 U. S. 234, are also involved, in that the exercise of juris-

diction by the Federal District Court was based upon the authority of this case.

(C) The United States statute involved is contained in Chapter 575, Section 17 of the Bankruptcy Act as amended June 22, 1938, 52 Stat. 851, Section 35 Title 11 U. S. C. A. The pertinent provision of said Section is paragraph (2) thereof, so that said Act as pertinent to our case reads as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (2) are liabilities for obtaining money or property by false pretenses or false representations, * * * ."

(D) The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed is dated October 29, 1940 (R. 66). Due to illness of counsel for petitioner (R. 67), the Circuit Court of Appeals extended by order the time for filing a motion for rehearing until November 18, 1940 (R. 68), on which date a motion for rehearing was filed (R. 69). The motion for rehearing in said Circuit Court of Appeals was denied by a judgment of said Court dated January 14, 1941, which is the date said judgment of said Circuit Court of Appeals became final for the purposes of this certiorari. *Gypsy Oil Co.* v. *Escoe* (Okla. 1927) 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393.

The bankrupt's petition in the District Court is described as a supplemental and ancillary bill in equity, in which the petitioner herein was "respondent" (R. 10 thru 15). A short summary of the evidence and proceedings in the District Court appear on page 35 of the record. The pertinent allegations in the State court petition charging the deceit complained of are contained on pages 23 and 24 of the record. The bankrupt's plea for a stay on account of bankruptcy in the State court is contained on page 26 of the record. The State court judgment is set out on page 28 of the record. The State court ruling denying the plea for stay on account

of bankruptcy was alleged by the bankrupt and admitted by respondent (R. 13, 35, 36), but no actual ruling to that effect was introduced in evidence by either party.

The order and the opinion of the District Court Judge appear on pages 37 thru 46 of the record, and are reported in 33 Fed. Supp. 631. The opinions of the Circuit Court of Appeals appear on pages 57 through 66 of the record, and are reported in 115 F. (2d) 189.

As to the jurisdictional questions (1), (1 a), (1 b), *supra* pages 6-7, petitioner raised same in the trial court in the pleadings (R. 36). The District Court judge expressly ruled that he had jurisdiction and based same on *Local Loan Company* v. *Hunt,* 292 U. S. 234 (R. 46). The question was preserved in the first statement of points before the Circuit Court of Appeals (R. 47, 48). This jurisdictional question does not appear to have been expressly ruled upon by the Circuit Court of Appeals, but the majority opinion expressly assumed that the exercise of jurisdiction by the District Court was proper (R. 58, 59). The dissenting opinion of Judge Sibley does not pass on the question of jurisdiction, because he held, the debt sued on was not dischargeable in bankruptcy, and even if jurisdiction was assumed by the District Court, it should have denied the relief prayed for.

The question of statutory construction involving said Section 17 (2) of the Bankruptcy Act was raised in the trial court in the pleadings (R. 36, 48). It was preserved in the statement of points before the Circuit Court of Appeals (R. 48). The opinions of the majority and dissenting judges were almost entirely devoted to this question.

We submit, therefore, that the question concerning the exercise of jurisdiction by the Federal District Court as well as the question of statutory interpretation of Section 17 (2) of the Bankruptcy Act are properly preserved for the purposes of this certiorari.

The Reasons Relied On for the Allowance of the Writ.

(1) With reference to the jurisdictional questions raised in questions (1), (1a) and (1b), pages 6-7 *supra,* the District Court and the Circuit Court of Appeals in the instant case decided an important question of Federal law which has not been, but should be settled by this Court. Also, the decision in the instant case on said questions is contrary to and conflicting with a decision of Second Circuit Court of Appeals.

An interpretation of the principles of *Local Loan Company* v. *Hunt, supra,* is involved. The principles of *Local Loan Company* v. *Hunt* restricted the exercise of jurisdiction to cases in which (1) the State Court decision was not only erroneous, but also contrary to the policy of the Bankruptcy Act; (2) the bankrupt was both innocent and honest; and (3) the bankrupt had made no effort whatsoever to enter into the State Court litigation, as was done in the instant case. It has never been decided that the unusual jurisdiction of *Local Loan Company* v. *Hunt* can be extended to cover cases in which (1) the State Court decisions are erroneous, but not contrary to the policy of the Bankruptcy Act; (2) the bankrupt is admittedly deceitful and dishonest; and (3) the bankrupt entered into the State Court proceedings, and when an unfavorable ruling was obtained, did not appeal further through the State Courts, but abandoned the State Courts and sought relief in the Federal District Court.

To extend the exercise of jurisdiction to such instances, as was done in the instant case, is to reduce the exercise of such jurisdiction practically to a matter "as of course," the only allegations being necessary in all such cases that (1) petitioner is impecunious and is in danger of loss of employment, (2) the debt is dischargeable in bankruptcy, and (3) the State Court decisions to the contrary are erroneous.

Such an extension would impose upon the Federal Courts the exercise of a broad additional jurisdiction, and take same away from the State Courts either before a State Court proceeding is commenced, or at any stage thereafter. The District Court and the majority of the Fifth Circuit Court of Appeals in the instant case subscribe to this broad extension of jurisdiction of the Federal Courts, while the Circuit Court of Appeals for the Second Circuit refused to give such a broad interpretation to the principles of *Local Loan Company* v. *Hunt*. Said latter Circuit Court of Appeals has placed this contrary and conflicting interpretation upon *Local Loan Company* v. *Hunt*:

> "Nevertheless, the exercise of such jurisdiction is not as of course; as Mr. Justice Sutherland's opinion points out, the Bankruptcy Court is not bound to exercise its authority and 'it probably would not and should not have done so except under unusual circumstances, such as here exist'. In our opinion it still remains true that in general the effect of a discharge is to be raised by pleading it as a bar when the creditor attempts to enforce his claim, or using it to procure cancellation of a judgment entered before a discharge, if the State statutes permit this procedure * * * This is not a case where the Bankruptcy Court has exclusive jurisdiction of the subject matter of the litigation so that the State Court's action might be disregarded. Concededly the State Courts had jurisdiction, and if they failed to apply correctly the provisions of the Bankruptcy Act, could have been set right by a writ to the Supreme Court * * * If the decision be wrong, it must be corrected in the orderly way by appeal, and if not, if necessary, by seeking a writ to the Supreme Court. We cannot extend the principle of Local Loan Company *v.* Hunt, supra, to mean that whenever a State Court is alleged to have determined erroneously that a creditor's debt is not released by the bankrupt's discharge, the latter may come into the Bankruptcy Court and have the issue retried." *In re*

Devereaux, 76 F. (2d) 522; Certiorari denied, *Devereaux* v. *Belsey*, 296 U. S. 589, 56 S. Ct. 100, 80 L. Ed. 416.

Petitioner in certiorari submits that the interpretation of *Local Loan Company* v. *Hunt* by the Second Circuit as set out in the above quotation is the sound and authoritative interpretation of the principles of *Local Loan Company* v. *Hunt*.

After all, this question of exercise of Federal jurisdiction boils down to the question whether or not a bankrupt should follow an orderly procedure of appeal through the State Courts to the Supreme Court of the United States, or be given an additional remedy and route of appeal through a Federal District Court and a Circuit Court of Appeals. There is an interesting commentary on the exercise of jurisdiction in the instant case by the Federal Courts, for if the bankrupt had been required to follow an orderly procedure of appeal through the State Courts, petitioner in certiorari would have had of right an appeal by writ of error to this Court but by the exercise of this unusual jurisdiction by the Bankruptcy Court, petitioner's right to have these important Federal questions decided by the Supreme Court of the United States has been reduced to a discretionary remedy. In fairness, since petitioner's right to an ultimate determination by this Court has been somewhat altered and modified by the doctrine of the *Local Loan Company* v. *Hunt* case, *supra*, this Court might in some measure restore the remedial benefits thus taken away from petitioner by determining once and for all the full measure of said jurisdiction and the conflicts of interpretation of said Section 17 (2) of the Bankruptcy Act.

(2) With reference to question (2), page 7, *supra*, the District Court and the Circuit Court of Appeals in the in-

stant case decided an important question of Federal law which has not been, but should be settled by this Court. In addition, said decision is contrary to and conflicting with decisions in four State Appellate Courts, the only other courts in which the question has been decided, to-wit, in the Appellate Courts of Georgia, Washington, Texas, and Kentucky. See *Atlanta Skirt Manufacturing Co.* v. *Jacobs*, 8 Ga. App. 299 (2), 68 S. E. 1077; *Levy* v. *Kiser Co.*, 31 Ga. App. 113, 120 S. E. 34; *Crawford* v. *Davison-Paxon Co.*, 46 Ga. App. 161, 166 S. E. 872; *Wells* v. *Blitch*, 182 Ga. 826, 187 S. E. 86; *Guernsey-Newton Co.* v. *Napier*, 151 Wash. 318, 275 P. 724; *Boerner* v. *Cicero Smith Lumber Co.* (Texas Appeals), 293 S. W. 632; *Louisville Dry Goods Co.* v. *Lanman*, 135 Ky. 163, 121 S. W. 1042, 135 A. S. R. 451.

In thirty-seven States, the District of Columbia, and five Federal Circuits throughout the country, the courts recognize that a deceit action based upon a promise made with no present intention of fulfilling it is in reality a suit based upon a false representation or false pretense. These jurisdictions are Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Minnesota, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Virginia, West Virginia, Washington, Wisconsin, the Second, Third, Seventh, Eighth and Ninth Circuit Courts of Appeal, and the District Court of Columbia. The cases in these majority jurisdictions are found in 51 A. L. R. 63; 68 A. L. R. 637; 91 A. L. R. 1297; 125 A. L. R. 881. In accord with these majority jurisdictions are the American Law Institute Restatement on Contracts, volume 2, section 473, and the Restatement on Torts, volume 3, sections 525 et seq.; Williston on Contracts 1937

Edition, sections 1521, 1494, 1496. In Pennsylvania, Colorado, Indiana, Vermont, Illinois, and Tennessee, such facts do not give rise to a cause of action for deceit unless coupled with a positive misrepresentation, trick or artifice. The cases of these minority jurisdictions are listed in 51 A. L. R. 78; 68 A. L. R. 638; 91 A. L. R. 1297; 125 A. L. R. 882. The majority of the Circuit Court of Appeals in the instant case in interpreting the phrase "a liability based upon false pretenses or false representations" wrote into the Bankruptcy Act the doctrine of said minority jurisdictions to the effect that there must be a positive misrepresentation, trick or artifice in addition to the allegations of a purchase on credit, while insolvent and without a present intention ever to pay. Judge Sibley, in his dissenting opinion, followed the philosophy of said great majority of jurisdictions which hold that when one promises to pay for merchandise, he impliedly represents that he has a present intention to pay for it, and if he has no such present intention, the buyer has made a false representation or a false pretense in making the purchase, and that no positive misrepresentation, trick or artifice is necessary.

While Pennsylvania is a minority jurisdiction, its Supreme Court has severely criticized the minority doctrine. Concerning the majority doctrine, the Pennsylvania Supreme Court said:

> "This seems to us much the sounder doctrine. While, as already said, a man has a right to take chances, and to be even sanguine in so doing, yet they ought to be reasonably fair business chances, and the hopefulness permitted by good faith. A purchase with a present intent not to pay is a rank fraud in morals, and should be so pronounced in law. The departure that was made in Smith *v.* Smith is therefore much to be regretted." *Bughman* v. *Central Bank,* 159 Pa. 94, 28 A 209.

Pennsylvania Courts, however, are astute to find trick or artifice in any additional circumstance to mere intention not to pay.

See *Allen* v. *Sarshik*, 299 Pa. 257, 148 A 25.

Illinois, listed herein as a minority jurisdiction, has cases upholding both the majority and minority positions. Compare *Miller* v. *Sutleff*, cited in the majority opinion in the instant case, *Brodsky* v. *Frank*, 342 Ill. 110, 173 N. E. 775, with *Ames* v. *Moir*, 130 Ill. 582 (Same case 138 U. S. 306), and *Luttrell* v. *Wyatt*, 305 Ill. 274, 137 N. E. 95. In *Ames* v. *Moir*, 138 U. S. 582, 11 S. Ct. 311, 34 L. Ed. 951 (Illinois case cited *supra*), this Court had before it an action of deceit based upon a purchase on credit without a present intention to pay for same. Said case came to this Court to determine if such fraud was excepted from a discharge under the Bankruptcy Act of 1867. On this question said case is not relevant, because the Bankruptcy Act of 1867 did not have the phrase "false pretenses or false representations" in it, but is relevant to show that this Court is not adverse to the philosophy of said majority jurisdictions. This Court therein said:

> "And if Ames made his call, with the knowledge that he was then insolvent, and with the purpose of getting possession of the wines and shipping them out of the State without paying for them according to the terms of the executory agreement of June 9, and received them with that preconceived intent,—and there was evidence that justified the jury in so finding—he was guilty of fraud in fact, involving moral turpitude or intentional wrong, and is not protected against the claim of the plaintiffs by his discharge in bankruptcy. Such was the view taken by the Court of original jurisdiction and by the Supreme Court of Illinois."

Missouri, not listed in either the majority or minority above, permits a recovery in deceit based upon a promise made without a present intention to perform it, if the additional allegation that the defendant was insolvent is added as was done in the instant case. Compare *Reed* v. *Cook*, 331 Mo. 507, 55 S. W. (2d) 275, and *Fox* v. *Webster*, 46 Mo. 181.

This statutory construction reading into the Bankruptcy Act the philosophy of said minority jurisdictions was indulged in by the majority in the Circuit Court of Appeals in the instant case confessedly to give a liberal interpretation to a discharge in favor of an honest debtor. While a liberal interpretation in favor of a discharge should be indulged in to give relief to an honest debtor (*Williams* v. *U. S. Fidelity Co.* (Georgia 1915), 236 U. S. 549, 35 S. Ct. 289, 59 L. Ed. 713), we submit that the policy of the Bankruptcy Act to reprove commercial dishonesty as well as to relieve honest debtors of their honest debts, requires no such liberal interpretation in behalf of an admittedly dishonest and deceitful debtor. In fact, the statutory construction indulged in by said majority opinion will never benefit or give relief to an honest debtor, but will be used constantly as a cloak or shield for the dishonest debtor. The following are a few instances in which a discharge will be granted to a fraudulent debtor, if said majority opinion finally becomes law. These illustrations are given not only to demonstrate the full significance of said majority opinion, but also to demonstrate the tremendous importance of the Federal question raised in this case, not only to merchandising institutions, but all other types of creditors and defrauded persons. This question has not been but should be settled by this Court. Consider the following instances:

(A) A customer of a retail store has a salary of $125.00 per month. She has incurred as many obligations as her

salary will take care of reasonably. She receives notice that her salary will be reduced from $125.00 to $75.00 per month. She realizes that she cannot pay off the obligations she has already incurred, and that she must take bankruptcy, which she definitely intends to do. Up to this stage, the debts she has incurred are honest debts, which, if she took bankruptcy at the time of said salary reduction, should be discharged in bankruptcy. However, she conceives of the idea of delaying her bankruptcy and before filing her petition, intends to buy as much merchandise and borrow as much money as she can and to list the obligations for same thereafter in her bankruptcy. She knows of a retail store in which there is a credit system, which she also knows, whereby a customer may make purchases under $5.00 or some such similar amount and obtain delivery of the merchandise without reference to the credit department for approval of the credit or the delivery of the merchandise. She knows that this credit system was evolved for the convenience of the great multitude of purchasers, and that in such purchases said store relied on the honesty and good intention of its customers. She knows that she can make these purchases, obtain delivery thereof and get out of the store before the credit department finds out about them or can prevent them. During this period and before filing her petition in bankruptcy, she makes a multitude of small purchases under said minimum amount, greatly in excess of her need. She sells a great proportion of same and keeps the money therefrom, not paying same on her account. She gives away a great deal of the other purchases to members of her family and friends. At various times during the period of time she was making these purchases the store requested her not to do so, but she continued to do so, and the store was unable to catch her or stop her. However, she made no positive misrepresentation in order to obtain said merchandise. Her fraud or deceit consists of taking ad-

vantage of the store through abuse of its said credit system. She definitely had no intention of ever paying for the merchandise, and intended to go into bankruptcy. Simultaneously during this period of time, in order to keep her other old creditors off her during this time, she notified them that her salary had been reduced from $125.00 to $75.00, and gained from them a reduction in monthly payments. However, in order to borrow money from other financial institutions during said period of time, which she never intended to pay, she represented to said other financial institutions that she still had a salary of $125.00 per month, which under the majority opinion would be a positive misrepresentation. After several months of this type of conduct, she reaches a financial impasse and when her new creditors and old creditors get after her for payment, she files a petition in bankruptcy. Under the doctrine of the majority opinion she can discharge her obligation against said store, but cannot discharge her obligation to the banks from which she obtained said new loans. All of her actions and conduct with respect to said store merely went to show that at the time she bought the merchandise from the store she was insolvent and had no intention whatever of paying for the merchandise. There is nothing peculiar about such a credit system for retail or other stores throughout the country. Such systems are based on a rule of convenience for the greatest number of customers, and it is true that in most instances customers are honest and do not take advantage of it. This type of fraud is described at great length, because it not only illustrates the type of fraud actually involved in the instant case, but also in numbers of other cases.

(B) The dishonest merchant who, without making an overt or positive misrepresentation, fills his store with merchandise purchased on credit, and during the cover of night removes the merchandise to a secret hiding place, and

during the same night has a fire to cover up the disappearance of the merchandise. Said merchant may go into bankruptcy and obtain a discharge as against said debt. If the creditor is lucky enough to find the evidence during the course of the bankruptcy proceedings, he could petition the trustee, if there was one, to return the merchandise to him. If the concealment was successful, and the seller found his merchandise after all value had gone out of it, or after the bankrupt had reopened another store and sold all of the merchandise for cheap prices, then the seller would have a remedy that was valueless. In fact, one of the Georgia cases held erroneous by the majority opinion is just such a case. See *Atlanta Skirt Manufacturing Co.* v. *Jacobs,* 8 Ga. App. 299.

(C) A customer of several retail merchants has good accounts with these merchants. He has an unusual liability suddenly thrust upon him about which the retail merchants did not know and probably would not find out if they inquired. This customer goes to each of these stores and without making an overt or positive misrepresentation buys as much as his account at each place will stand, intending not to pay therefor, but to take bankruptcy when the stores get after him for payment. In a few days he has loaded up his accounts and then goes into bankruptcy. The several retail merchants cannot and do not cross-check with each other constantly, and credit facilities cannot be used to check up daily. Under the ruling of said majority opinion, this debtor may go into bankruptcy, and the retail merchant only has recourse to getting back the soiled merchandise, which he could not use or sell again.

(D) A person realizing that he intends to take bankruptcy goes to various retail merchants and opens an account. The retail merchant does not in the ordinary course of business put him through a questionnaire which would disclose the true condition of his finances, but usually asks him such

routine questions as his address, where he works, and sometimes his salary and personal references. Most customers of retail stores will not stand for a detailed inquisition sufficient to show their true state of affairs. This person opens these accounts intending to go into bankruptcy at the time. Under the ruling of said majority opinion this person may get his discharge in bankruptcy as against this debt.

(E) Husband and wife are both working making small salaries such as $100.00 per month each, and both salaries combined give a good basis for credit. The wife and husband, knowing that the wife will soon have to quit work, but while she is still working, conceive of a plan to buy as much as possible on the credit established by their joint income, and then take bankruptcy. They have no intention whatsoever of paying for the merchandise. They go into bankruptcy, and can be discharged.

(F) A young person promises an old person that if she will deed her house and home to him in fee simple, he will maintain and support her the balance of her life. He takes the property, immediately sells it, and dissipates the proceeds. Under the majority opinion doctrine, the old lady is left to her remedy of rescission, but the house has already gotten in the hands of a bona fide purchaser. Since the only basis of her cause of action against said young person is that he made a promise to support and maintain her for the balance of her life with no intention of fulfilling it, a personal judgment against the young person would not be of much value to her, because he can immediately discharge it in bankruptcy. The Supreme Court of Illinois in *Miller* v. *Sutleff, supra,* cited in said majority opinion hedged when confronted with this sort of set of facts. But the doctrine should be the same whether the defrauded person be a department store or an old lady.

(G) An unscrupulous stock salesman, having a worthless stock to sell, swaps it to an old lady (and these stock salesmen do prey on the aged and weak), but carefully refrains

from making any overt or positive misrepresentation or false pretense, but does promise the old lady that if she will buy this stock she will obtain large dividends, which he faithfully promises her she will have, and further that if she is ever dissatisfied with the stock he will exchange it for her for any stock she will choose or will give her her money back. It is futile to say that this old lady can rescind the transaction or impose a constructive trust for relief, because the proceeds of the fraudulent transaction in the hands of the salesman will usually have been dissipated. However, a judgment in tort against which the salesman cannot obtain a discharge in bankruptcy might give her some relief. But under the doctrine of said majority opinion, since all his representations were promissory in nature, even though it was obvious that he had no intention of carrying out any of these promises, he may obtain a discharge in bankruptcy.

(H) The manufacturer who obtains an advantageous agreement out of his distributor just prior to the expiration of the distributorship upon his promise to renew the distributorship, even though at the time the manufacturer has another distributor lined up to take the distributorship over, could likewise avoid a liability by a discharge in bankruptcy, even though it was evident he had no intention of fulfilling his promise to renew the distributorship with the old distributor.

(I) If the first person promise the second person to give the second person a job if the second person will lend the first person a certain amount of money, and the first person use the very proceeds of the loan to pay the costs of his bankruptcy, and other circumstances show that the first person had no intention of giving the second person a job, the first person can relieve himself of any liability by discharge in bankruptcy under the doctrine of the majority opinion.

Other appalling possibilities of the majority opinion readily suggest themselves, but the above instances suffice to demonstrate the vast import and significance of the doctrine laid down in the majority opinion. Since the weak as well as the strong can be victimized as a result of said doctrine, it should be apparent that said majority opinion should not be justified on the ground that a department store, being financially strong, which streamlines its credit facilities to fit the modern merchandising methods, must take such risks and bear the expense thereof as an incident to said modern merchandising methods. The losses thrust upon it from such practices would of necessity have to be passed on to the innocent or honest customer in the form of increased prices, thereby injuring such customers as well as the store itself.

Of course in each of the above and foregoing instances, the bankrupt could be prosecuted in the State Court, no doubt, for cheating and swindling, as was clearly pointed out in the dissenting opinion. Yet the imposition of a criminal liability upon a wrongdoer does not give material relief to the defrauded person. In fact, it seems anomalous that the bankrupt could be prosecuted criminally for an act of the above types, but at the same time come within the protection of a bankruptcy discharge as though he were an innocent and honest bankrupt. Genuine fraud as indulged in by the ordinary crook such as the above persons would be, carries as little overtness and as much concealment as possible. Our Courts should realize this truth and keep its statutory construction in step with modern methods not only of merchandising, but also the slick methods of the fraudulent wrongdoer.

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